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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76, Original

STATE OF CALIFORNIA
Plaintiff,

v.

STATE OF TEXAS
Defendant.

Reply to Brief in Opposition to Motion for Leave to File Complaint

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PRELIMINARY STATEMENT

The Brief in Opposition filed by Texas contains a great deal of irrelevant material. We shall not respond to the incomplete and one-sided description of decedent's life presented in Texas' Statement of Facts. Tex. Br., at 2-6. California alleges in its proposed Complaint that both California and Texas were prosecuting their domicile-based death tax claims in good faith (Complaint ¶ 2) and we do not understand Texas to contend otherwise. Discussion of the merits of the domicile dispute is thus premature.

Rather, in this response we shall deal, first, with the attempt by Texas to distinguish—or advocate the overruling of—*Texas v. Florida,* 306 U.S. 398 (1938). See Part I, *infra.* Then, in Part II, *infra,* we shall discuss the Pro-

visional Settlement Agreement between California and the estate which Texas unjustifiably contends disentitles California from proceeding in this Court.

I.

JURISDICTION IN THIS CASE IS PROPERLY FOUNDED UPON TEXAS V. FLORIDA, 306 U.S. 398 (1938).

A. A Case or Controversy Plainly Exists Between California and Texas Because There Exists A Substantial Risk of Conflicting Adjudications of Domicile and the Imposition of Inconsistent Taxes in Excess of the Assets of the Estate.

The proposed Complaint alleges that Texas and California each seek to levy a domicile-based inheritance tax on the estate of Howard Hughes and that if both states do so the applicable tax rates, combined with the federal rate, will exceed 100%. These allegations, which are based entirely on facts which have already been established as a matter of public record, are sufficient to establish jurisdiction under *Texas v. Florida*, 306 U.S. 398 (1938). Simple arithmetic demonstrates that California's ability to collect its full, lawfully-imposed tax is gravely threatened by Texas.

Against these facts, Texas advances only speculation that this event or that might substantially diminish the likelihood that the estate will be unable to satisfy the tax claims of both California and Texas. Such speculation provides no basis for a refusal to entertain this suit. For reasons discussed in detail herein, the contingencies advanced by Texas, taken either separately or together, are an insufficient basis upon which to leave California unprotected against the irreparable injury which Texas threatens to its public purse. But even if we are wrong, and future events render it more likely that the estate will retain sufficient funds to satisfy the tax claims of both California and Texas, that determination may best be made in an atmos-

phere illuminated by actual circumstance rather than pure speculation. Assessment of the precise degree of likelihood that California will suffer irreparable injury at the hands of Texas should be made in the first instance by a Special Master on the basis of detailed factual showings by each party; a motion for leave to file is an inappropriate point for Texas to attempt to controvert, and this Court ultimately to assess, the jurisdictional allegations of California's complaint.

At this juncture, *Texas v. Florida* requires only a showing that "conflicting claims are asserted and that the consequent risk of loss is substantial." *Id.*, at 406. It is inherent in the nature of the equity jurisdiction recognized in that case that its invocation does not and cannot require a demonstration to a near-certainty that these inconsistent tax claims will exceed the assets of the estate. Although it may not be possible to calculate with the nice certainties of a statistician the exact probability that California will be unable fully to enforce a tax judgment, an examination of the various speculative contingencies proposed by Texas could hardly permit a confident judgment that California's fears are groundless. Jurisdiction under *Texas v. Florida* is not defeated by the possibility of a *deus ex machina*. The purpose of the interpleader jurisdiction established in that case is to "avoid[] . . . the *risk* of loss resulting from the *threatened* prosecution of multiple claims." *Id.*, at 410 (emphasis added). The invocation of the jurisdiction cannot be stayed until the feared loss becomes a reality or until the competing claims are reduced to judgment (*State Farm Fire and Casualty Co. v. Tashire*, 386 U.S. 523, 531-33 (1967)), since to await those contingencies would force the stakeholder to suffer the risks and expenses of multiple adjudications where only one claim can, under any circum-

stances, be valid and would expose the other claimants to the danger of losing the "race to judgment." *Id.*, at 533.

Thus *Texas v. Florida* specifically holds that "a plaintiff need not await actual institution of independent suits" to invoke the jurisdiction (*id.*, at 406); *a fortiori*, invocation of the jurisdiction need not await a final determination of the value of the estate, the resolution of the will controversies or the reduction of the compelling tax claims to final judgment. *Texas v. Florida* requires only that the circumstances "as they are in good faith alleged and shown to exist at the time the suit was brought" establish that the "risk of loss is real and substantial." *Id.*, at 407, 410. That is what California has done here.

All the factors which the Court in *Texas v. Florida* thought sufficient to assess the risk of estate depletion as "real" and "substantial" are present in this case. The "jurisdictional peculiarities of our dual federal and state judicial systems" (*id.*, at 410), which permit competing states to secure inconsistent death tax judgments, have not changed since 1938. As in *Texas v. Florida*, the decedent's relationship with both California and Texas was such "as to afford substantial basis for the claim that he was domiciled within it, with *fair probability* that the claim would be accepted and favorably acted upon." *Id.*, at 411 (emphasis added). Similarly, in this case, "the facts most essential to establish that attitude and relationship of person to place which constitute domicile [are] obscured by numerous self-serving statements of decedent as to his domicile which, because made for the purpose of avoiding liability for state . . . taxes levied on the basis of domicile, tend[] to conceal rather than reveal the true relationship in this case." *Id.*, at 411.[1]

1. *See, e.g.*, Tex. Br., at 2-6.

Moreover, there are additional factors here, not present in *Texas v. Florida*, which enhance the likelihood that the tax claims will exceed the available assets of the estate. The magnitude of the estate is so great and the tax rates sufficiently high that jurors passing on a domicile claim may perceive a direct financial stake in the outcome, thus increasing the likelihood of a decision favorable to the taxing state. *Cf. Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. City of Monroeville*, 409 U.S. 57 (1972); *Connally v. Georgia*, 429 U.S. 245 (1977). Moreover, quite unlike the situation in *Texas v. Florida*, the responsible taxing officials of both contending states have already taken concrete action to enforce their asserted tax claims. *Compare Texas v. Florida, supra* at 402, n. 5. And, as pointed out in our moving papers (Memorandum, at 15), in *Texas v. Florida* the assets would have been insufficient only in the statistically unlikely event that each of *four* separate states found decedent to be its own domiciliary and levied a death tax; here, that result will occur in the far more probable event that only *two* states—California and Texas—do so.

Texas offers an elaborate hypothetical (Tex. Br., at 14 n. 6) based upon the possibility that the different jurisdictions may appraise the estate at somewhat different valuations. The most obvious flaw in Texas' analysis is that it assumes that the discrepancies will result in tax valuations at *less* than actual value; it is, however, equally likely that variations will result in over-valuation, which would only exacerbate the problem.[2] In any event, with presumably

2. Indeed, whatever bias each taxing agency brings to bear on the valuation question would presumably push toward over-valuation, since the greater the valuation, the more tax collected. While we have no reason to think that any agency is biased in any direction, there is certainly no reason to believe that any of the three taxing jurisdictions involved in this case would significantly undervalue the estate.

reasonable persons evaluating the same assets according to the same criteria, there is no reason to believe that the resulting valuations will vary so widely as to alleviate the inability of the estate to pay the cumulative tax bill.[3]

Texas speculates that in future years the estate—as a consequence of its ownership of the stock of Summa Corporation—may generate sufficient funds to pay the assessed taxes on an installment basis. Tex. Br., at 15. But, while not a static entity, Summa Corporation is not an income producing one. Indeed, an affidavit filed by Milton West, Jr., a member of the Summa board of directors and counsel for the Hughes estate (the relevant portion of which is attached hereto as Appendix "A"), states that Summa had an operating loss in each of the five years ending in 1975 and the first nine months of 1976 with a cumulative total of over $131 million. Although current figures are not publicly available, the California Inheritance Tax Division has been advised by a representative of the estate that in 1976 Summa sustained a net operating loss of more than $29 million and a reduction of net book value of more than $169 million (the latter figure reflecting substantial write-downs of assets and a reserve of $87 million for litigation). The Division has been further advised that, although final figures for 1977 are not yet available, there will again be a substantial net operating loss of more than $15 million. The estate, therefore, appears to be a

3. Additionally, because the federal tax rate is substantially higher than that of the states, any potential difference in valuation could have a significant effect on the total taxes due only if the federal valuation were significantly lower than that of both the states—as, not coincidentally, it is in Texas' hypothetical. Moreover, any potential difference in valuation would be offset by the far more stringent limits which California places on deductions. See note 5, *infra*.

shrinking asset rather than a growing one. At the same time, the payment of tax under the deferral provisions necessarily increases the amount of interest due which, in California, accrues at 12% per annum.[4] For Texas to be correct in viewing Summa's dubious income generating potential as the solution to the problem, the estate would have to generate income (net of income taxes) in *excess* of the accruing interest on unpaid death taxes; thus far, it appears to have fallen far short, and with every passing day the accrued interest increases the shortfall.

It should also be noted that a number of expenses and liabilities which may be deducted for purposes of determining federal estate taxes are not allowed for California inheritance tax purposes. The Complaint therefore alleges (in Appendix "A") that the estate had claimed deductions for federal estate tax purposes of $115,034,274 but that only $47,906,072 of that amount would be deductible for California inheritance tax purposes.[5] Thus, the combined taxes (even without regard to accrued interest) are substantially more than 101% of available assets and the short-

4. In addition, since California's interest rate of 12% is substantially greater than that of Texas (6%) or the federal government (a variable rate which is presently 6%), the proportionate share of taxes going to California will increase over time, thus further increasing the likelihood that California will be unable to collect the amounts properly due it.

5. The explanation for the difference in allowable deductions rests primarily on the fact that California imposes severe limits on the deductibility of costs of administration and fees for attorneys, executors and administrators. While such expenses are deductible for federal estate tax purposes if they were authorized under state law and, in the case of attorney's and executor's fees, approved by the probate court, California limits deductibility to a small percentage of the estate's value for attorney's and executor's fees and permits deduction only of the *ordinary* costs of administration. *Compare* 26 U.S.C. § 2053 with CALIF. REV. & TAX CODE § 13988, CALIF. PROBATE CODE § 901, 910 and 18 CALIF. ADMIN. CODE § 13988(g)(10). Thus while the estate claimed a deduction on its

fall is not merely one percent. For example, based upon the values reported by the estate and the calculations set forth in Appendix "A" to the Complaint, the total taxes and interest through 11/6/77 would be $72,609,296, against available assets of approximately $51 million. Complaint ¶¶ 12-13. Thus, the taxes would be not 101% of the available estate but roughly 142%; the shortfall would be approximately $21 million, which is roughly two-thirds of the $32 million of tax due to California. See Complaint ¶ 12. For these reasons, neither the possibility of inconsistent valuations nor the availability of an extended payment period materially diminishes the probability that the estate will be subjected to liability greater than it is able to bear.

There is also the question of the pendency of the "Mormon will" and "lost will" claims. We know of no way by which this Court can make an independent analysis of the probability that either of these rather bizarre and unlikely will claims may prevail, thus reducing the potential tax liability of the estate. We believe it sufficient to say that the possibility of reduced tax collections has not deterred Texas from spending, according to its papers, seventeen months of intense preparation and, doubtless, hundreds of thousands of dollars for the Texas domicile trial. Nor will the pendency of the will contests deter California from

federal estate tax return of $12,675,000 for administrators' and attorneys' fees, the maximum amount deductible under California law for these purposes (at the same valuation) would be $3,407,662.00. Extraordinary costs of administration, such as sales and maintenance expenses and interest, are also nondeductible in California although the estate claimed a deduction on its federal return of $18,082,207.00 for such costs. 18 CALIF. ADMIN. CODE § 13988(g). The remaining difference results primarily from California's unwillingness to permit deduction of disputed federal tax claims against the estate, due to their contingent nature. *Id.* § 13983(d).

taking the necessary steps to assess and collect its asserted tax. Because the Texas trial will determine both the question of domicile for inheritance tax purposes *and* the validity of the Mormon will, a decision by this Court which forces California to await resolution of the Mormon will controversy—not to mention resolution of the "lost will" claim—would necessarily compel California to await a final judgment of the Texas courts on Texas' entitlement to levy its inheritance tax before taking steps to protect against the possibility of such a judgment. Under the circumstances, California was not obliged to defer initiating this proceeding until *after* completion of the Texas trial.[6]

Moreover, Texas is simply wrong in assuming that the admission to probate of the Mormon will would eliminate the risk that California would be unable to collect the death taxes due it. To the contrary, although the net amount of tax would be reduced because a portion of the estate would go to charity and would therefore not be taxed, the tax on the non-charitable bequests would apparently have to be satisfied solely out of that portion of the estate going to the non-charitable beneficiaries. That non-exempt portion of the estate would be exceeded by the aggregate tax claims resulting from those bequests. In other words, if the estate were worth $300,000,000, and $200,000,000 were left to charity, the taxes on the non-charitable bequests of $100,000,000

6. Indeed, if California *were* to have deferred initiating this action until such contingencies as these were eliminated, Texas would undoubtedly have contended that California had waited too long and was barred by laches. Such a suggestion was made by Texas in its Response to Application for Temporary Restraining Order and Preliminary Injunction (see pp. 2-3). While that contention was without merit and now has apparently been abandoned, a proceeding in the nature of interpleader not initiated until *after* one of the claimant states has obtained a final judgment could well be regarded as untimely.

would have to be recovered from the non-charitable beneficiaries and would exceed the amount devised to them.[7]

Finally, Texas complains (Tex. Br., at 16) that California has failed to allege that the "local assets" of the estate are insufficient to satisfy its tax claims. Though easily and truthfully made, such an allegation would be unnecessary and irrelevant for several reasons. First,

7. The statement in the text results from three factors:
First, as the Mormon will contains no tax allocation clause, the burden of the federal estate tax—which has priority over state tax claims (see 31 U.S.C. § 191)—would under California law be allocated to the non-charitable beneficiaries. See CALIF. PROBATE CODE § 970; *Estate of Buckhantz*, 120 Cal. App.2d 92, 101 (1953).
Second, the Texas inheritance tax is a tax on succession which falls on the beneficiary, not the estate as a whole. *Norton v. Jones*, 210 S.W.2d 820 (Tex. Civ. App. 1948). Thus any tax collected by Texas would be collected from the assets passing under the will to the non-charitable beneficiaries and not from the charitable beneficiaries which, of course, are exempt from payment of tax. TEX. TAX-GEN., Art. 14.015(2)
Third, the California inheritance tax is likewise imposed upon the transferee's right of succession, not on the estate as an entity. *Estate of Setrakian*, 169 Cal.App.2d 795 (1959). The inheritance tax rates thus vary according to the relationship between the decedent and the beneficiary. See CALIF. REV. & TAX CODE §§ 13404, 13405 and 13406. The administrator or executor is authorized to deduct the tax due on each transfer from the property given to the transferee or, if the property transferred is not money, to collect the tax from the transferee before distributing the property. CALIF. REV. & TAX CODE § 14121. But nothing in the Revenue & Taxation Code authorizes the personal representative to pay one person's inheritance tax out of property bequeathed to another, for the tax is not imposed on the estate, but on the transferee, and the representative is merely the agent of collection. *Cohn v. Cohn*, 20 Cal.2d 65, 67-68 (1942). Moreover, the statutory inheritance tax lien is imposed not on the entire property of an estate, but only on "the property included in the transfer on which the tax is imposed." CALIF. REV. & TAX CODE § 14301. Thus, the property going to the charitable beneficiaries under the "Mormon Will" would be free and clear of the statutory tax lien and the executor would be under no legal duty to surrender that property to the state in satisfaction of the tax liabilities of non-exempt beneficiaries.

approximately 61% of the estate will go in any event to the federal government, which is obviously indifferent as to whether the assets from which it is paid are located in Texas, California or elsewhere. Under federal law (31 U.S.C. § 191), the federal tax claim has priority over state tax claims and it is simply impossible at this juncture to predict the legal situs of the balance of the estate which will be left after the federal tax claim is satisfied. Second, as Texas admits (Tex. Br., at 12), the "majority of the assets" in the estate consists of the Summa stock which is intangible and whose legal situs is deemed to be the state of Mr. Hughes' domicile. Should Texas secure a judgment in its own courts—in which the interested heirs have personally appeared—that it is entitled to levy an inheritance tax based upon domicile, it will be able to enforce that judgment in any forum, including the courts of California. *Riley v. N.Y. Trust Co.*, 315 U.S. 343, 349-50 (1942). Thus such assets as are located in California might well be used to satisfy either the federal or the Texas tax demands. Finally, as Texas well knows, the tangible assets of the estate located in California are nominal.[8] The undeveloped land in California which Texas asserts is sufficient to satisfy California's tax claims (Tex. Br., at 16) is owned by Summa and not the estate. Unless California could establish that Summa and Hughes were *alter egos* (*see* p. 25, *infra*), this property could not be reached by California in execution of any judgment for inheritance taxes.

In short, Texas has invited this Court to join in its speculations about various contingent events which *might*

8. The Estate has filed an inventory in the Los Angeles Superior Court reporting that the total value of the tangible assets situated in California is approximately $145,000, obviously a negligible percentage of the Hughes estate however its assets are ultimately valued.

obviate the conditions which presently jeopardize California's ability to enforce its inheritance tax laws and which bring it into conflict with the state of Texas. These speculations are unauthorized by *Texas v. Florida,* which requires only a showing of a substantial risk that the California tax cannot be collected. In all events, they cannot obscure the harsh reality of a grave risk that this massive and complex estate will be met with conflicting tax claims and will be unable to pay the tax due to California. The Complaint alleges tax claims totalling 142% of the estate's assets, based upon the values reported by the estate. Although Texas posits hypothetical circumstances which could reduce this shortfall, the Complaint alleges (¶ 15) that the estate is suffering severe losses, even as substantial amounts of interest accrue, all of which only increase the deficit. If this case is not within the original jurisdiction of the Court established in *Texas v. Florida,* no case could be.

B. Texas v. Florida Represents a Classic Exercise of This Court's Power to Decide Jurisdictional Disputes Between States and Should Not Be Overruled.

In Part III of its brief, Texas contends that *Texas v. Florida* represents "a singular intrusion upon the exclusive jurisdiction of the various states to administer a decedent's local property" because, it is said, "a state has 'full and absolute dominion' over property within its borders". Tex. Br., at 22 (citation omitted). In its view, *Texas v. Florida* "constitutes a highly questionable exercise of this Court's original jurisdiction" (*id.,* at 19) because the Court (albeit at the instance of none other than the State of Texas) improperly invaded the established domain of the states; Texas urges that *Texas v. Florida* should not be "extended" here. Because this case is indistinguishable from *Texas v.*

Florida,[9] the argument amounts to nothing less than an entreaty that it be overruled. While one might expect greater consistency from the state which successfully invoked the Court's jurisdiction in that case (and, of course, in *Texas v. New Jersey,* 379 U.S. 674 (1965) as well), it requires little to show that Texas' argument proceeds from a demonstrably erroneous premise.

That premise is that the assets of the estate are "local property" over which Texas has undoubted jurisdiction. Tex. Br., at 22. This would be true were the estate composed primarily of real and tangible personal property, but it is not; it is composed largely of the shares of Summa Corporation, which of course constitute intangible assets which for death tax purposes are deemed to have the situs of the decedent's domicile. See 8 DEL.C. § 169. Texas can state that these shares are "local property" which is "in" Texas only by assuming a favorable resolution to the very controversy at issue between California and Texas.

Because the assets of the estate are insufficient to satisfy both claims, this case is no different in principle from disputes involving boundaries, navigable waters and the like where two states have asserted conflicting and contra-

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9. The claimed "extension" upon which Texas relies rests on the assertion that "all states in *Texas v. Florida* were apparently willing to have this Court adjudicate matters of their local law." Tex. Br., at 25. But the alleged failure of the defendants to contest jurisdiction in that case in no way affects the determination of California's motion or differentiates the two cases, for it is settled law that the failure of a defendant to object to jurisdiction does not avoid the issue of whether jurisdiction exists; the consent of the parties cannot confer jurisdiction. Indeed, in *Texas v. Florida,* the Court raised the matter of its jurisdiction *sua sponte* despite the lack of jurisdictional exceptions to the report filed by the Special Master. *Texas v. Florida, supra,* at 405. Since a party's affirmative assent cannot create jurisdiction, *a fortiori,* a party's objection to well-founded jurisdiction cannot destroy it. The claimed distinction between this case and *Texas v. Florida* is therefore without merit.

dictory jurisdictional claims over the same subject matter. The Hughes estate is legally indistinguishable from a river over which two states assert jurisdiction; both cannot prevail, and only this Court can settle the controversy in accordance with its constitutional mandate. Only by dissembling can Texas contend that, in *Texas v. Florida,* "there was no question concerning the location of the various assets of Colonel Green's estate and thus no dispute as to which state could exercise *in rem* jurisdiction in the distribution thereof." Tex. Br., at 20. *Texas v. Florida* would have been an academic exercise if determination of the domicile controversy had not fixed the legal situs of the intangible assets of the Green estate and thus ended the dispute as to which state had taxing jurisdiction.

Similarly, Texas finds "highly questionable" the "jurisdictional basis of *Texas v. Florida* . . . that only one state could properly tax the estate" (Tex. Br., at 24), in light of modern mobility and the many potential jurisdictional bases for state taxation. Anyone remotely familiar with the life of the well-travelled Col. Green (see *Texas v. Florida, supra,* at 414-23; see also LEWIS, THE DAY THEY SHOOK THE PLUM TREE (1963)) could scarcely regard that case as an anachronistic relic of a less mobile day. In any event, if Texas means that assets in an estate may permissibly be subjected to multiple taxation on different bases, we do not disagree; this, of course, was established by *Graves v. Elliott*, 305 U.S. 667 (1938), *Curry v. McCanless,* 307 U.S. (1939) and *State Tax Commissioner v. Aldrich,* 316 U.S. 174 (1942), the first two of which were decided contemporaneously with *Texas v. Florida* and cited in that opinion. Thus, the post-mortem transfer of the Summa shares which form the major part of the estate's assets could presumably be taxed both by the state of Mr.

Hughes' domicile and the state of Summa's incorporation. But the critical fact is this case, as in *Texas v. Florida* (see 306 U.S., at 408), is that the contending states are asserting taxes on the *same* conceptual basis—domicile—and not on other, possibly available grounds. Whether Texas could constitutionally tax the Hughes estate on the basis of the alleged benefits it provided Mr. Hughes during his life is simply not an issue in this case, for Texas has not chosen to assert such a tax. Rather, it has sought to collect a tax on the basis of Mr. Hughes' domicile, as has California, and the two conflicting domicile claims, which cannot both be satisfied, clearly create an inter-state controversy requiring this Court's adjudication.

Although Texas seeks to characterize *Texas v. Florida* as outmoded, the only relevant development since *Texas v. Florida* confirms the jurisdictional path identified in that case. In *Western Union v. Pennsylvania*, 368 U.S. 71 (1961), a Pennsylvania court had determined that abandoned funds in the possession of a corporation doing a nationwide business should be escheated to Pennsylvania despite conflicting claims of at least one other state. This Court, reversing, held that due process forbids such a course "unless the Pennsylvania courts had power to protect [the stakeholder] from any other claims." *Id.*, at 75. As the other states were not bound by the Pennsylvania judgment (and could not be made parties to the Pennsylvania proceedings, see 368 U.S., at 75), this requirement could not be satisfied. Thus, the Court concluded (citing *Texas v. Florida*), a state seeking to escheat funds claimed by more than one state must proceed under this Court's original jurisdiction; due process precludes an adjudication in the state courts.

Where the taxes claimed exceed the total net estate, separate adjudications deprive the transferees of the protection, which under *Western Union* due process arguably

assures, against inconsistent adjudications of liability. This seems especially so where, as is ordinarily the case in inheritance taxation, both the transferee and the personal representative are personally liable for payment of the inheritance tax—in this instance a liability which exceeds the amount inherited. See CALIF. REV. & TAX CODE § 14101b;[10] TEX. TAX-GEN. ANN. Art. 14.18(c) (Vernon); see generally CCH INHERITANCE, ESTATE AND GIFT TAX REPORTER ¶ 2030B. That factor underscores the parallel to *Western Union*: there an inconsistent adjudication would mean that the stakeholder was unprotected against a total liability which exceeded the funds held by it; here, an heir could be liable to more than one taxing authority for inconsistently imposed taxes in excess of the amount inherited.

Western Union seems to us to mean that once a state is on notice of multiple tax claims which subject the estate and the heirs to inconsistent liabilities in excess of the estate's assets, its state courts may not adjudicate the tax claim in a proceeding which does not bind the other claimants; rather, the state *must* invoke the original jurisdiction of this Court. That is what California has done here, and it is ironic that Texas now argues that the invocation of jurisdiction—which *Western Union* suggests was obligatory—was somehow inappropriate.[11]

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10. In California, for example, the Controller is empowered to enforce the transferee's personal liability by levying a writ of execution upon *any* property of the transferee and not simply the inherited property which gave rise to the tax liability. CALIF. REV. & TAX CODE § 14322.

11. Necessarily, it follows that in such a setting, as in the escheat case, exercise of this Court's original jurisdiction is virturally obligatory, for any other procedure "denie[s] . . . due process of law because it could not protect [the administrator and heirs] against rival claims of other States." *Pennsylvania v. New York*, 407 U.S. 206, 209 (1972).

Finally, it bears mention that in the forty years since *Texas v. Florida* was decided, no flood of inheritance tax-domicile litigation has burdened this Court as a consequence. Many states—though not Texas—have enacted mandatory arbitration statutes for the resolution of such controversies. *See, e.g.* CALIF. REV. & TAX. CODE §§ 14199-14199.13. Careful estate planning doubtless plays a part in avoiding the problem in the first instance. And, presumably, states and estates resolve by settlement most of the controversies which do arise and which otherwise could come to this Court. *Texas v. Florida* provides a sound and necessary remedy for the exceptional case. This is such a case.

C. The Abstention Doctrine Is Inapplicable to This Case Because There Is No Alternative Forum Where California's Claims May Be Determined.

In the concluding section of its brief (pp. 25-30), Texas contends that the doctrine of abstention compels the denial of California's motion and, implicitly, the overruling of *Texas v. Florida*. This contention is founded on the same faulty premise as Texas' argument regarding the "singularity" of *Texas v. Florida*—that assumption of jurisdiction by this Court would interfere with Texas' power over assets undeniably local in character—and should be rejected for the same reasons. See pp. 12-14, *supra*. Even if this were not true, however, there are additional and compelling reasons why the abstention doctrine is wholly inapplicable to California's motion.

At the outset, we note that Texas' concern for the rights of states (Tex. Br., at 25-26) is wholly misplaced. California is also a state, and no less than Texas has substantial interests at stake. The concern for federalism which has led this Court to inhibit the power of federal courts to inter-

fere with state court proceedings by states against their own citizens is in no way implicated when one state seeks relief against another. States are co-equal sovereigns; a state and its individual citizens are not. It is the essence of our federal structure that controversies between co-equal states be resolved, not by courts of one of the contestant states, but by this Court.

The inapplicability of either *Pullman* or *Younger*-type abstention is apparent when one recognizes that there simply is no state tribunal to which California should or could resort if this Court were to decline to entertain this action. State courts have no more jurisdiction over controversies within this Court's exclusive jurisdiction than the lower federal courts. *Friedberg v. Santa Cruz* 86 N.Y.S.2d 369, 274 App. Div. 1072 (1949); *De Miglio v. Paez,* 189 N.Y.S.2d 593, 18 Misc.2d 914 (1959). As the Court recently noted in *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493 (1971), a central purpose underlying the grant of original jurisdiction to this Court is that "no state should be compelled to resort to the tribunals of other states for redress . . . ." *Id.,* at 500. California can only litigate its dispute with Texas here.

Texas does not, of course, suggest that California is obliged to appear in the Texas courts to litigate its domicile claim, nor has it offered to appear in the California proceedings. Rather, it offers the remarkable observation that "Delaware provides an alternative and more effective forum 'in which the issues tendered here may be litigated'." Tex. Br., at 29. The suggestion that California, after securing a favorable inheritance tax judgment in its own courts, could and should then proceed to relitigate the domicile controversy in the courts of Delaware is without merit. The Delaware court would then have before it an action to determine whether the tax liens of California and Texas on the stock

of Summa are valid as against the heirs and the estate. It could not do as Texas suggests and re-determine the tax judgments of Texas and California; rather, it would be obliged to give full faith and credit to each state tax judgment rendered against the heirs who were parties thereto. See *Texas v. Florida, supra,* at 410.[12]

The conclusion is inescapable that there is no alternative forum in which California can present its claims, and certainly none in which it should be required to proceed. The denial by this Court of California's motion for leave to file its complaint would leave California helpless to prevent

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12. Admittedly, Texas would not be bound by the California judgment because it would not have been a party to it; and for the same reason California would not be bound by the Texas judgment. But the judgment of each state court would run against the estate and the heirs and those litigants could not re-litigate the judgments because of the command of the full faith and credit clause. Nor could California itself attack the Texas judgment, for that would be a controversy between states beyond the jurisdiction of the Delaware court.

Indeed, Texas' suggestion that Summa's interpleader action in the Delaware courts provides a "more effective forum" (Tex. Br. at 29) to litigate the domicile controversy between California and Texas is startling in view of the fact that Texas' response to being named as a defendant in that action was to move to dismiss for lack of jurisdiction. In that motion, filed on behalf of the Texas Comptroller, the Texas Attorney General contended, *inter alia,* that neither Texas nor the Texas Comptroller could be subjected to suit in the courts of another state without legislative consent, due to the doctrine of sovereign immunity. The motion is still under submission in the Delaware courts. Whether a Delaware court could exercise personal jurisdiction over the State of Texas or its taxing officials, which presumably transact no business there, is a question which Texas does not even pose, let alone answer. And after *Shaffer v. Heitner,* ..... U.S. ....., 53 L.Ed.2d 683 (1977), the fact that the interpleader action concerns shares in a Delaware corporation which Delaware deems to have a Delaware domicile does not establish jurisdiction over defendants who otherwise have had constitutionally insufficient contact with the forum.

For all these reasons, it is evident that in all probability California could not litigate the validity of the Texas tax judgment against Texas or the estate in the Delaware court, even if it desired to do so—which it does not.

Texas from depleting the estate of assets which will, in all likelihood, be necessary to satisfy California's legitimate tax claims. Abstention is therefore inappropriate.

II.

CALIFORNIA IS A REAL PARTY IN INTEREST WHICH SEEKS RELIEF FOR ITS OWN BENEFIT AND THUS HAS STANDING TO INVOKE THIS COURT'S ORIGINAL JURISDICTION.

The proposed Complaint alleges that this suit was initiated "on behalf of the State of California to protect its statutory inheritance tax lien on decedent's estate . . . and not on behalf of the estate or any other person or entity." Complaint ¶ 17. Nevertheless, Texas contends that this action has been brought "on behalf of the [Hughes] estate and thus is not within this Court's original jurisdiction." Tex. Br., at 10. This is so, Texas charges, because the Provisional Settlement Agreement between California and the estate[13] is a collusive one (*id.*, at 11) which disentitles California to invoke the Court's jurisdiction. These assertions are legally and factually incorrect.

That the Provisional Settlement Agreement between California and the estate does not cast doubt upon—and, if anything, enhances—this Court's jurisdiction is readily apparent upon a consideration of its terms.

The Provisional Agreement, in essence, seeks to resolve the potential controversy between California and the estate. In it the estate (and the heirs) agreed to pay an inheritance tax to California (at a compromise rate of 18%) in resolution of the dispute between them as to whether Hughes was a domiciliary of California or Nevada. But because the estate was understandably unwilling to pay such a tax to

13. A copy of the Provisional Settlement Agreement was lodged with the Court by California in connection with the prior application for a preliminary injunction and is now reprinted in the Appendix to the Texas Brief in Opposition.

California if Texas will also be able to levy a 16% tax, the Provisional Settlement is conditioned upon a determination, binding upon both Texas and California, of whether Texas is entitled to assess a domicile-based inheritance tax. (Agreement, ¶ 1).

As shown in the previous section, absent the Agreement, there is undeniable jurisdiction to resolve the dispute between California and Texas. If this Court were to regard the Provisional Settlement Agreement as somehow impairing that jurisdiction and accordingly declined to allow its exercise, then, under Paragraph 1, the Settlement would be nullified and the basis for jurisdiction would be restored. Accordingly, the Settlement does not affect the existence of a live controversy and casts no doubt on the Court's jurisdiction. *Cf. Zablocki v. Redhail,* .....U.S....., 46 U.S.L.W. 4093, 4096 n.9 (1978) (enactment of new statute, applicable only if and to the extent old statute enjoined by any court, does not moot challenge to old statute because if old statute upheld, new statute will cease to be effective).

It passes beyond the borders of reality to suggest this is a suit "brought in the name of a state but for the benefit of individuals." Tex. Br., at 8. California is plainly the real party in interest in this litigation. California, not the estate, will receive whatever monetary benefits result from this action and its claims are premised on its power as a sovereign to tax the transfer of property of its domiciliaries at death. It is absurd to suggest that California, which seeks to impose on the estate severe inheritance taxes, is acting for the estate's benefit. This action clearly serves California's fiscal interests and was initiated solely for that purpose. California has no interest in protecting the estate or the heirs (most of whom do not even reside in California) and has no reason to act for their benefit.

We do not deny that the initiation of this suit may nevertheless be of indirect benefit to the estate to the extent that it eliminates the risk to it of double taxation. But this suit indirectly benefits the estate in no way not equally present in *Texas v. Florida.* The fact that a third party may receive an indirect benefit from the invocation of this Court's jurisdiction is legally irrelevant to the question of whether original jurisdiction has been properly invoked. *South Dakota v. North Carolina,* 192 U.S. 286, 310 (1904) (jurisdiction of this Court held unaffected by fact that plaintiff state, which held bonds issued by defendant state, received those bonds as a donation from an individual bondholder who hoped to benefit from the donee state obtaining judgment on the bonds).[14] The point is that California had real and substantial interests of its own to protect, and those interests are the basis for this suit.

14. That fact that California will reap the direct benefits which result from this litigation differentiates this case from the authorities cited by Texas (*New Hampshire v. Louisiana,* 108 U.S. 76 (1883), *Kansas v. U.S.,* 204 U.S. 331 (1907), and *Oklahoma ex rel. Johnson v. Cook,* 304 U.S. 387 (1938)). In each of those cases, the State was merely the nominal plaintiff, while the direct benefits of litigation accrued to private third parties—a bondholder, a railroad company and the creditors and depositors of a bank, respectively. In none of those cases would the State, even if successful, have derived any benefit from the litigation. Thus, in *New Hampshire v. Louisiana, supra,* a New Hampshire statute permitted private individuals holding delinquent bonds issued by other states to assign the bonds to the State for collection, authorized the state Attorney General to sue on the bonds in this Court upon payment of expenses by the bondholders and provided that the bondholders would recover any sums collected by suit or recovered through compromise or settlement. *Id.* at 76-77. The Court declined to accept jurisdiction, holding that the lawsuit was "under the actual control of individual citizens, and . . . prosecuted and carried out altogether by and for them." *Id.* at 89. By contrast, where a state had full title to bonds issued by another state, even though the bonds had been donated by a private bondholder, suit between the states to recover on the bonds was held to be within the Court's original jurisdiction. *South Dakota v. North Carolina,* 192 U.S. 286 (1904), discussed at p. 27, *infra.*

While Texas claims that the agreement reached between California and the estate is offensive to the "mandates of conscience and good faith" (Tex. Br., at 11), it fails to explain why this is so. The nearest it comes is to assert that the Provisional Settlement Agreement may permit California to recover a tax (albeit at a compromise rate) without a judicial finding that California was the state of domicile. Tex. Br., at 10. Texas overlooks the fact that the very purpose of a settlement is to enable a party to recover less than the full value of its asserted claim without the necessity of subjecting that claim to the rigors of a full-fledged trial or securing a favorable factual determination thereon. Because it is often difficult to tie together the conflicting strands of a person's life into a single thread of domicile, many states, including both California[15] and Texas,[16] provide their taxing authorities with power to compromise death taxes in the event of a dispute as to domicile. See CCH INHERITANCE, ESTATE AND GIFT TAX REPORTER ¶ 12,035. There is nothing about the agreement reached between California and the estate which renders it different in principle from any other compromise of a dispute between a taxing authority and a taxpayer; indeed, the Provisional Agreement is founded on the mutual recognition that California and the estate could readily have reached a complete and unconditional settlement in the absence of Texas' competing claim.[17]

15. CALIF. REV. & TAX CODE § 14191.

16. TEX. TAX-GEN. Art. 14.13.

17. Were Texas truly concerned—as it claims to be—with deterring agreements between "states with weak inheritance tax claims and high inheritance tax rates" and wealthy estates (Tex. Br., at 11), it would have enacted, as California has done, a statute enabling an administrator or executor of an estate facing multiple tax liability based on conflicting claims of domicile to force the competing states to arbitrate the domicile issue, thus limiting the estate's potential exposure to one of the competing claims. See CALIF. REV. & TAX CODE § 14199.1.

Far from being offensive to the conscience, the Provisional Settlement serves the salutary function of narrowing and confining the issues in dispute between California and Texas should the Court accept jurisdiction. A controversy which began as involving several possible domiciles has been substantially narrowed, there remaining only the contention of Texas that Hughes was domiciled there. As a result, the Court will not be required to determine the actual state of domicile once it has found Texas' claim to be without merit; the compromise of the interested parties renders that unnecessary. In reviewing a life that spanned at least three states and several foreign countries, that cannot be said to be an insignificant or inappropriate saving of judicial time and energy. Moreover, the Provisional Agreement insures that the only parties who need appear before the Court are the two contesting states; the Agreement has, for purposes of death taxation, resolved the conflicting domicile claims of the numerous heirs who have asserted an interest in the Hughes estate. The result, again, is to spare the Court the cacophony of voices and claims which this litigation would otherwise have presented.

The assertion that the Provisional Settlement Agreement is collusive is preposterous. To state that it reflects an agreement between the parties who signed it merely identifies the obvious. Surely the policy of the law encourages settlements short of litigation. See *Bordenkircher v. Hayes*, ... U.S. ....., 46 U.S.L.W. 4089 (1978). And nothing in the Agreement in any way renders less than adversary the controversy between California and Texas. Indeed, the Agreement does not even address the single issue which this Court is asked to adjudicate: whether Hughes was a domiciliary of Texas for death tax purposes. Should Texas

obtain a judgment from this Court that it is the state of domicile, it will receive every penny of tax to which it is legally entitled under its statutes. As clearly noted, the Provisional Settlement merely undertakes to resolve a dispute, in which Texas is not involved, between California and the estate as to whether, after Hughes became a Californian, he thereafter moved his domicile to Nevada.

Nor can some sinister and collusive significance be attached to the provision of the Agreement (¶ 5) which provides for payment of an approximately two percent tax if Texas is found to be the state of domicile. Indulging itself with unsupportable rhetoric, Texas characterizes this as an agreement "to pay California two percent (2%) . . . regardless of the merits of California's claim, in return for its obtaining a domicile determination by this Court." Tex. Br., at 10. This allegation is entirely without basis. The Agreement states that such payment is to be "in full settlement and compromise of all death tax claims which could be asserted by it even if Decedent were not a domiciliary of California." Among other things, such payment would be in settlement and compromise of California's contention that Summa Corporation was the *alter ego* of Hughes and that its substantial real property and tangible personal property situated in California are therefore properly the subject of California death taxes without regard to domicile.[18]

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18. Nor do the events which led to the filing of this action support Texas' charge of collusion. We have already filed with the Court a declaration showing that California advised Texas of its intention to file suit in this Court two weeks before the commencement of negotiations leading to the Provisional Agreement (Declaration of Jerome B. Falk, Jr. filed in conjunction with California's Reply to Response to Application for Temporary

The very most that Texas could properly say of the Provisional Settlement is that it is irrelevant to the question of jurisdiction under *Texas v. Florida*. As we have shown, it does no more than resolve part of the domicile question in dispute—an aspect with which Texas should be unconcerned—and leave for adjudication in this Court the controversy involving Texas' claim of domicile. But in reality the Provisional Settlement *enhances* California's interest in this controversy and California's entitlement to invoke the jurisdiction of this Court.

Absent the Provisional Settlement, California would have stood in this Court, as did Texas in *Texas v. Florida*, as a claimant advancing one of several possible domicile claims. The Court might have found Hughes to be a domiciliary of Nevada, Texas, California, Mexico, the Bahamas—to name only the most likely possibilities. In that setting, California might well have defeated the claim of Texas but failed to prevail against some other possible domicile. In short, California's interest—while sufficiently substantial to warrant such a litigation—was far from certain.

The Provisional Settlement Agreement substantially alters the picture and materially enhances California's stake in the controversy between it and Texas. If the domicile claim of Texas can be defeated, California is assured

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Restraining Order For Preliminary Injunction); that declaration has gone unchallenged here.

We find especially offensive the suggestion that an understanding between counsel for California and counsel for the estate, whereby the estate's counsel agreed to make available deposition transcripts, pleadings, and other documents potentially relevant to this litigation, should be regarded as collusive. Texas surely does not favor the suppression of relevant evidence, nor can it plausibly suggest that every request for the production of documents must be met with a demand that the requesting party obtain a subpoena.

under the Agreement that the estate will pay an 18% tax to it.

Because this Court would undeniably have jurisdiction under *Texas v. Florida* even in the absence of the Provisional Settlement (see Part I, *supra*), we are not obliged to rely on it as the basis for invocation of jurisdiction. But it is plain that, far from defeating jurisdiction, the Provisional Settlement underscores it. In that regard, this case is *a fortiori* from *South Dakota v. North Carolina*, 192 U.S. 286 (1904). There the holder of bonds issued by North Carolina gave a small fraction of those bonds to South Dakota advising it, in his letter of transmittal, of its right to sue North Carolina on the bonds and promising to make "additional donations" to the state if it were successful in obtaining judgment. *Id.*, at 290. In accepting jurisdiction, this Court squarely held that, as South Dakota held full title to the bonds at the time the suit was instituted, it was irrelevant that its claim arose from a donation or sale by a private party. *Id.*, at 312.

If a state originally having no claim of its own may invoke the jurisdiction of this Court by procuring a cause of action from an individual third party, that jurisdiction is certainly not impaired when California, which already possessed a claim against Texas, enhances its interest in that claim by virtue of a settlement agreement with the estate. At the outset of its brief, Texas propounds the rhetorical question whether a state's claim "based upon a contract with private parties provide[s] an adequate basis for the exercise of this Court's original jurisdiction" (Tex. Br., at 1); despite the inaccuracy of the question as a description of the issues raised by California's motion, *South Dakota v. North Carolina* holds that it does. And in all

events, for present purposes it is enough to say that such a contract does not defeat pre-existing jurisdiction.[19]

DATED: February 3, 1978.

Respectfully submitted,

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19. Through a printer's error, one figure in Appendix "A" to the Complaint is erroneous, that for the total California tax. The table shows $26,128,129.00, while the correct figure is $32,195,010.00. The total figure for state and federal taxes in Appendix "A" is correct, as are the figures set forth in the Complaint and supporting memorandum. This error will be corrected in the copy of the Complaint filed with this Court and served upon Texas should the motion for leave to file be granted.

Appendix A

Excerpt from Affidavit of Milton H. West, Jr.
In the Court of Chancery of the State of Delaware
in and for New Castle County
Civil Action No. 5058, 1976

FILED
JAN. 9 '77
COURT OF CHANCERY
JOHN D. KELLY III

SUMMA CORPORATION, a Delaware corporation,
Plaintiff,
v.
FIRST NATIONAL BANK OF NEVADA, et al.,
Defendants.

THE STATE OF DELAWARE
COUNTY OF NEW CASTLE—ss.

Milton H. West, Jr., being duly sworn according to law, does depose and say that:

1. He is a partner in the law firm of Andrews, Kurth, Campbell & Jones ("Andrews, Kurth") and that his firm has rendered legal services on behalf of Howard R. Hughes, Sr. and Howard R. Hughes, Jr. ("HRH") since shortly after the turn of the century.

* * *

37. The net operating income (or loss) of Summa (with the exception of that of the Oil Tool Division which was sold in 1972) has been as follows:

1971	$(40,574,000)
1972	(21,834,000)
1973	(15,228,000)
1974	(2,005,000)
1975	(29,692,000)
1976 (first 9 months)	(22,466,000)
Total	$(131,799,000)

MILTON H. WEST, JR.
Milton H. West, Jr.

Sworn to before me this 16th day
of June, 1977.

RICHARD S. PAGE
Notary Public